Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1231

JERRY A. TRUITT, and JAMES K. MONTGOMERY, JR.,
Petitioners,

vs.

WILLIAM M. LENAHAN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JERRY A. TRUITT and JAMES K. MONTGOMERY, JR., your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported officially, but is printed in full as Appendix A to this petition.

The Memorandum Decision of the District Court, although not officially reported, is printed in full as Appendix B to this petition.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Sixth Circuit were entered on February 5, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the taxpayers' privilege against self-incrimination under the Fifth Amendment may be lawfully circumvented by the seizure of business books and records pursuant to a search warrant where the taxpayer having sole possession and ownership of such records objects to the forcible seizure.

2. Whether the Fourth Amendment prohibition against "unreasonable searches and seizures" was violated by resort to a search warrant where the taxpayers previously had permitted inspection of the records for more than a month before asserting their Fifth Amendment privilege, and where there was no showing that the records were concealed or likely to be destroyed or secreted.

3. Whether the taxpayers were deprived of due process of law where the Internal Revenue Service, in the face of highly incriminating information supplied by a former employee, assigned a revenue agent to make a "routine audit" instead of initiating a criminal investigation by a special agent, who would have been required to advise taxpayers of their constitutional rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. *United States Constitution, Fourth Amendment:*

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. *United States Constitution, Fifth Amendment:*

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

3. *United States Code, Title 18:*

"§ 3103a. Additional grounds for issuing warrant.

In addition to the grounds for issuing a warrant in section 3103 of this title, a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States."

4. *Federal Rules of Criminal Procedure, Rule 41(b):*

"Property Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of a crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense."

STATEMENT OF THE CASE

Shortly before noon on Good Friday, April 12, 1974, six Special Agents of the Internal Revenue Service entered the professional offices of petitioner Truitt. The agents informed Dr. Truitt, a veterinarian, that they had a search warrant and proceeded to seize his books and records. (App. 83-85)[1] The warrant commanded the agents to seize all records pertaining to the income tax liabilities of petitioners for 1971 and 1972 and "prior years." (App. 16-18)

On September 25, 1972, a former employee of petitioners had telephoned the IRS Intelligence Division. She conversed for 15 to 30 minutes with a Special Agent, who thereafter prepared the following memorandum: (App. 39-40; 102)

> The informant is a former employee of Drs. J. K. MONTGOMERY and J. A. TRUITT. She stated that for the past three years, during her period of employment, Drs. MONTGOMERY and TRUITT have received fees in cash of $500 to $600 per week and have not recorded them on the books. She said that the books were "perfectly in order", and that you could tell nothing by going over them. Ms. GREENWOOD said that a check of the "patient" account cards, which are kept on

1. All references herein are to the Appendix filed in the Court of Appeals.

The books and records involved were formerly those of a partnership conducted by petitioners, but were purchased by Dr. Truitt from his co-petitioner, along with all other partnership assets, on March 26, 1973, when the partnership was formally terminated by written agreement. (App. 116-124) Despite the purchase and the continued use of the records in Dr. Truitt's individual practice, the District Court held that the seized records were not privileged under the Fifth Amendment. On appeal, the Court of Appeals did not reach this issue.

> file, would reveal a great discrepancy between the recorded fees per the books and the fees per the account cards. She said that the veterinarians also kept a cash receipts journal, but that each fee recorded in it was also recorded on the books.
>
> * * *
>
> The informant stated that the former bookkeeper, NETA McGANA (DURHAM), Kraft Road, Memphis, Tennessee (telephone #332-7575) was also aware of the doctors' scheme to evade taxes.

The informant told the Special Agent that she handled money at the front desk, how she knew that petitioners were diverting cash, and precisely how the diverted funds were kept off the books. (App. 103-104) The allegations of the informant were evaluated by another Special Agent, who concluded against an investigation by the Intelligence Division. This agent testified by affidavit that the decision whether to investigate criminally was "basically a subjective one", depending in part on "the current workload of the office." (App. 40-41)

In September, 1973, petitioners' 1971 income tax returns were assigned to a Revenue Agent for examination. During the following month and for one day in November, the agent conducted his examination at the offices of Dr. Truitt. His comparison of the cash receipts records with payments recorded on "patient" account cards, which also reflected the treatment given, disclosed various omissions from income. The Revenue Agent then requested permission to reproduce all the account cards at the IRS offices. (App. 48-50)

When the request to copy was refused, the case was referred to the Intelligence Division. (App. 51) Shortly thereafter, petitioners' newly retained attorney advised

the IRS that the records would not be made available, citing his clients' constitutional rights. (App. 55-56) The Intelligence Division did not contact the taxpayers. Instead, the Special Agent interviewed the informant, and then sought permission to seize the records with a search warrant. (App. 37-38) In making this request, the Special Agent stressed that it would be "almost impossible to prove a substantial understatement . . . without access to the books and records". He further noted that the IRS "would have a limited amount of time invested in the cases in the event the evidence obtained by the search was later suppressed." (App. 92)

When the search warrant was served, Dr. Truitt telephoned his attorney and thereupon advised the agents that he did not consent to the search. (App. 84-85) Petitioners' attorney arrived while the search was in progress and informed the agents that both petitioners objected to execution of the warrant on the basis of their constitutional rights under the Fourth and Fifth Amendments. (App. 97)

Petitioners promptly filed a complaint seeking suppression and return of the seized documents, and suppression of all evidence obtained by the Revenue Agent during his prior inspection. (App. 2) The District Court directed return of the original records, but permitted the IRS to copy and retain microfilm copies pending final determination of the rights of the parties. (App. 19) Following denial of the Government's motion to dismiss, the parties filed cross-motions for summary judgment. (App. 32, 111) The District Court granted the Government's motion and the Court of Appeals affirmed the order dismissing the taxpayers' action with prejudice.

REASONS FOR GRANTING THE WRIT

1. The holding below is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit

in *Hill* v. *Philpott*, 445 F. 2d 144 (7th Cir. 1971), *cert. denied*. The Fifth Amendment issue is identical to that involved in *Shaffer* v. *Wilson*, No. 75-601, wherein the Solicitor General urged this Honorable Court to grant the taxpayers' petition insofar as it relates to the alleged self-incrimination question.

2. Unlike *Shaffer*, or any prior instance in which the IRS resorted to the drastic search warrant procedure, the issuance of the warrant in the instant case was prompted solely and simply by the taxpayers' assertion of the Fifth Amendment after permitting inspection of the records for more than a month. Here, the Service had no reason to believe that the taxpayers had concealed records, or that the records would be secreted or destroyed if a warrant were not issued. Thus, this case presents the most compelling circumstances for review, and this petition should be granted even if certiorari is denied in *Shaffer*.

3. The decision below conflicts in principle with numerous decisions of this Court which hold that the intrusion by search warrant requires a careful prior determination of "necessity" and that the "drastic" search warrant remedy should be used only for the most compelling reasons. In holding that the IRS could seize unconcealed records (previously made available to the Revenue Agent) the opinion squarely conflicts with the decision of the Court of Appeals for the Ninth Circuit in *VonderAhe* v. *Howland*, 508 F. 2d 364 (9th Cir. 1974).

4. As the opinion below notes, the IRS frequently assigns cases for "routine audit" notwithstanding the fact that it has received incriminating evidence from informants. The IRS thereby circumvents its self-imposed requirement of giving *Miranda* warnings and deprives unwarned criminal suspects of due process of law under

the Fifth Amendment. In the interests of insuring equality of treatment for taxpayers, it is imperative that this Court establish standards for determining the circumstances under which the IRS must initiate an investigation by the Intelligence Division.

ARGUMENT

I

The Fifth Amendment Violation

Petitioners contend that their rights under the Fifth Amendment were violated by the seizure of privileged records. Their contention is squarely supported by the holding of the Court of Appeals for the Seventh Circuit in *Hill* v. *Philpott*, 445 F. 2d 144 (7th Cir. 1971), *cert. denied*. In *Shaffer* v. *Wilson*, No. 75-601, the Solicitor General conceded that the identical holding therein was in "direct and acknowledged conflict" with the *Hill* case and requested that the petition be granted with respect to the Fifth Amendment question. See also, *Bellis* v. *United States*, 417 U.S. 85, 87-88 (1974), where the Court held that the Fifth Amendment privilege does protect "business records."

The Court of Appeals did not reach or decide the Government's contention below that the records in the instant case were not privileged. Accordingly, petitioners deem it unnecessary to support their position that the Government seized personal and private records of petitioner Truitt, which he was not holding in any representative capacity. In view of the Government's acquiescence to certiorari in *Shaffer*, petitioners have not set forth their reasons why the holding below is erroneous and why this Court should approve of the reasoning and result in *Hill* v. *Philpott*, 445 F. 2d 144 (7th Cir. 1971), *cert. denied*.

In the event that this Court should deny certiorari in *Shaffer*, there are compelling grounds, not present in *Shaffer*, for granting the petition in this case. These reasons are set forth below.

II

The Fourth Amendment Question

In the event that this Court should conclude that privileged records may be seized under a warrant, petitioners contend that the seizure violated the "reasonableness" requirement set forth in the first clause of the Fourth Amendment. That overriding standard is not satisfied by a mere showing that there was "probable cause" to believe that a crime has been committed. The probable cause requirement for issuance of a search warrant is contained in the second, and subsidiary, clause of the Amendment.

It has long been accepted that a search warrant should be utilized only "for very urgent and satisfactory reasons." 1 Cooley, *Constitutional Limitations* 618 (8th ed. 1927). Indeed, this Court has noted that the "proceeding by search warrant is a drastic" remedy. *Berger* v. *New York*, 388 U.S. 41, 58 (1967). See also, *Sgro* v. *United States*, 287 U.S. 206, 219 (1932).

In *Camara* v. *Municipal Court*, 387 U.S. 523, 539 (1967), this Court specifically held, with respect to the warrant procedure, that "reasonableness is still the ultimate standard." See also, *Berger* v. *New York*, 388 U.S. 41, 69 (1967) (Justice Stewart, concurring); *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968); *White* v. *United States*, 271 F. 2d 829, 830 (D.C. Cir. 1959).

The Fourth Amendment standard of reasonableness requires that "no greater invasion of privacy" be

permitted than is "necessary under the circumstances." *Berger* v. *New York*, 388 U.S. 41, 57 (1967); *Katz* v. *United States*, 389 U.S. 347, 355 (1967). The same concern for establishing the necessity for a search was expressed in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). Thus, the decisions of this Court implicitly hold that a showing of probable cause that a crime has been committed, and that incriminating evidence is located on specific premises, is not under all circumstances determinative of the reasonableness of, or necessity for, the search. See also, *United States* v. *Williams*, 351 F. 2d 475, 477 (6th Cir. 1965).

In *Stanford Daily* v. *Zurcher*, 353 F. Supp. 124, 131 (N.D. Cal. 1972), the court declared that intrusions upon privacy "should take place only when 'necessary'." The court held that there must be a showing that the destruction of evidence is threatened before a warrant may be issued, and that a mere failure to respond to a subpoena duces tecum would not suffice. (353 F. Supp. at 133) Although the case involved a threatened search against a third party, the ruling should be applicable to those suspected of tax crimes. The Supreme Judicial Court of Maine has stated that the purpose of a search warrant is to seize the thing alleged to be in the place to be searched "to prevent removal or further concealment." *State* v. *Martelle*, 252 A. 2d 316, 320 (Me. 1969).

The Internal Revenue Code provides an unobtrusive method for compelling the production of non-privileged books and records, namely, issuance of a summons under Section 7602. It is unthinkable that the mere assertion by a taxpayer of his rights under the Fifth Amendment can justify the seizure of privileged records. That, however, is the essence of the holding below,

which emphasized the fact that the warrant was obtained "only after appellants refused to permit the reproduction of certain documents". (Slip Op., p. 4) The Court refused to attach any significance to the fact that the agent had had access to the records for more than a month and that he presumably could have continued his inspection indefinitely.

In a tax investigation, resort to the search warrant should be sanctioned, if at all, only where there is a showing that at least some of the needed records are hidden, concealed, or likely to be destroyed or secreted. In the instant case, the Government seized books and records used openly on the premises, all of which had been made available to the revenue agent. There was no showing, and no reason to believe, that such records would be concealed or destroyed, or that they were in fact hidden. The countless animal "patient" account cards, which disclosed the unreported income, were vital to the day-to-day operations of the veterinarians. (App. 98) They served as "medical" records and always reflected "exactly what the doctor had done for the pet." (App. 52, 70, 77, 98)

VonderAhe v. *Howland*, 508 F. 2d 364 (9th Cir. 1974), squarely supports petitioners' contention. In the cited case, the Court of Appeals held that "probable cause" did not exist for the seizure of anything except hidden records which had not been made available to a revenue agent during his audit. The Court upheld the seizure of secreted "yellow sheets" and "green cards", but refused to sanction seizure of "the identical material which had been delivered to and examined by" a revenue agent. (508 F. 2d at 369)

It should be readily apparent why there are no cases, other than *VonderAhe*, explicitly upholding peti-

tioners' contention that a showing that the records are concealed, or likely to be destroyed, is a prerequisite to issuance of the search warrant. Prior to *Warden* v. *Hayden*, 387 U.S. 294 (1967), the only items subject to search and seizure were contraband, stolen goods, and instrumentalities of crime. Such articles inevitably would be hidden or concealed, or be in danger of secretion or destruction. Exigency is implicit in their very nature, and the search warrant provided the only available means of obtaining them.

In no prior instance has the IRS ever utilized the warrant procedure to seize only records previously made available to a revenue agent. On the contrary, the Service has resorted to search warrants only where it feared destruction or had reliable information that secretive or secreted records would not be otherwise accessible.

In *Hill*, certain patient records were kept separately and were to be thrown into the incinerator if any tax man visited the office. In *VonderAhe*, a separate record of income from emergency patients was removed from the doctor's office and taken home prior to a scheduled IRS audit. Equally significant, the record in *Shaffer* discloses that two employees swore that the doctor would never give his "cheat book" to the IRS and that he would destroy or hide all records not essential to daily operations.

It is manifest that the warrant issued by the Magistrate was obtained without the showing of necessity or "probable cause" required by the Fourth Amendment. Accordingly, the search and seizure did not meet the constitutional mandate of reasonableness, and the warrant must be invalidated. The mere assertion of a Fifth Amendment claim cannot supply the "necessity" required by the Fourth Amendment.

III

The "Due Process" Issue

The opinion below merely states that the IRS had "received a 'tip' from a former employee" asserting that petitioners had concealed income. Regrettably, the Court refrained from detailing the highly incriminating information that had been given to the IRS by the employee. The informant carefully explained the basis for her allegations and gave the name of another employee who allegedly would corroborate her contentions. The instant case bears no resemblance to *United States* v. *Robson*, 477 F. 2d 13 (9th Cir. 1973), where the examination was assigned to a Revenue Agent because the "information given by the informant was vague on several key points". (477 F. 2d at 14)

If, as petitioners contend, the incriminating allegations made by their former employee had been investigated at the outset by the Intelligence Division, a Special Agent would have been obliged to advise the taxpayers of their constitutional rights, including their right to refuse inspection of books and records. (IR 949, 11/26/68, 1968 CCH Stand. Fed. Tax Rep. par. 6946) The courts have held that the self-imposed warning requirements of IR 949 must be scrupulously observed and that failure to do so violates the due process clause of the Fifth Amendment. *United States* v. *Heffner*, 420 F. 2d 809 (4th Cir. 1969) (voiding a conviction); *United States* v. *Leahey*, 434 F. 2d 7 (1st Cir. 1970) (affirming a suppression order). These cases will be meaningless if the courts countenance assignment of cases to the Audit Division for "routine" audits where the circumstances plainly dictate that an immediate criminal investigation should be initiated.

In the instant case, the Special Agent gave no plausible explanation for concluding that the information supplied by the informant had no criminal potential. Instead, his affidavit merely recited that communications from employees frequently are motivated by ill feelings and are found to have no substance. (App. 40) He conceded, moreover, that the evaluation of information items is not based solely on the "apparent criminal potential of the item", but that the decision depends in part on the "current workload of the office." (App. 41)

Section 9311.2 of the Internal Revenue Manual, entitled "Evaluation of Information Items," provides that all allegations of tax evasion "will be evaluated by the Chief, Intelligence Division or his delegate, *without regard to available manpower*, solely on the basis of possible development of a successful prosecution." (Emphasis added) Items having criminal potential are to be retained by the Intelligence Division for investigation. (CCH Int. Rev. Manual Service, p. 28,127)

Petitioners submit that an informant's allegations should be evaluated in a reasonable and prudent manner by the IRS. Here, the Revenue Agent was permitted to verify and document highly incriminating allegations made by a reliable informant. A surreptitious criminal investigation was conducted under the guise of a "routine audit".

Unlike *U. S.* v. *Leonard*, 524 F. 2d 1076 (2d Cir. 1975), cited by the Court below, this case does not involve a possibly "unintentional or excusable" violation, and it is inconceivable that the IRS "mistakenly" believed that the investigation had "not yet become one 'of suspected criminal tax fraud' ". (524 F. 2d at 1089) On the contrary, the only permissible inference is that

the IRS deliberately assigned a Revenue Agent to conduct what it most certainly knew to be a criminal investigation.

On the uncontroverted facts, the District Court should have concluded that the information supplied by the informant did have "criminal potential" and that retention for investigation by the Intelligence Division was required. Because the IRS failed to observe its "housekeeping" requirements, the taxpayers did not receive the warnings to which they were entitled under the published rulings. Accordingly, they were deprived of due process of law to the same extent as the taxpayers in *Heffner* and *Leahey*, and through a procedure which is far more reprehensible.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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February, 1976.

APPENDIX

APPENDIX A

No. 75-1694

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JERRY A. TRUITT and JAMES K. MONTGOMERY, JR.,
Plaintiffs-Appellants,

v.

WILLIAM M. LENAHAN, EDWARD A. KEENE and FOUR UNIDENTIFIED AGENTS, SPECIAL AGENTS, INTERNAL REVENUE SERVICE; OSCAR PLUNKET, JR., REVENUE AGENT, INTERNAL REVENUE SERVICE; JAMES A. O'HARA, DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE; THOMAS F. TURLEY, JR., UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF TENNESSEE; AND THE UNITED STATES OF AMERICA,
Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed February 5, 1976.

Before: PHILLIPS, Chief Judge, and PECK and LIVELY, Circuit Judges.

PECK, Circuit Judge. Plaintiffs-appellants, formerly partners in practicing veterinary medicine, filed the instant complaint seeking primarily to suppress the use of documents certain defendants-appellees, Internal Revenue Service special agents, seized in a search, pursuant to a warrant, on April 12, 1974, of appellants' offices. Appellants also prayed for money damages. The district court rejected appellants' constitutional claims and, on cross-motions for summary judgment, dismissed appellants' complaint with prejudice.

Briefly, the record reflects that on September 25, 1972, the IRS Intelligence Division received a "tip" from a former employee of appellants claiming that appellants had concealed income. An Intelligence Division special agent thereafter transmitted the information "to the Audit Division for whatever action they deemed appropriate" because "there was not sufficient information . . . to warrant an investigation by the Intelligence Division."[1] From September, 1973, to November, 1973, an Audit Division revenue agent investigated the claimed failure to report income and discovered, from an inspection of appellants' books, an apparent substantial understatement of income. When appellants refused to permit the revenue agent to reproduce certain documents for a fuller inspection, the agent on November 12, 1973, referred the investigation to the Intelligence Division, which received the referral

1. Intelligence Division special agents investigate possible criminal violations of the Internal Revenue Code. Audit Division revenue agents "conduct . . . field audits of tax returns . . . requiring the application of audit techniques and the review of books, records and other information to determine the correct tax liability." Joint Appendix 45, 47-48. See IRS News Release No. 897 (Oct. 3, 1967), quoted in *United States* v. *Trnka*, 385 F. Supp. 628, 632 n. 3 (D.N.D. 1974), and in *United States* v. *Potter*, 385 F. Supp. 681, 682 (D. Nev. 1974).

produce those documents,[2] *United States* v. *Beck*, 511 in February, 1974. The Intelligence Division after interviewing the original informant, obtained the search warrant on April 11, 1974.

On appeal, appellants claim that seizing the documents violated their Fifth Amendment privilege against self-incrimination. Assuming that such privilege would otherwise preclude appellants from being compelled to F.2d 997, 1002-03 (6th Cir.), *cert. denied*, 96 S.Ct. 63 (1975), *United States* v. *Gargotto*, 476 F.2d 1009, 1013-14 (6th Cir. 1973), *cert. denied*, 95 S.Ct. 1990 (1975), and *United States* v. *Blank*, 459 F.2d 383, 385 (6th Cir. 1972), *rev'g* 330 F. Supp. 783 (N.D. Ohio 1971), *cert. denied*, 409 U.S. 887 (1972), establish that "[a]dmitting properly seized 'personal papers' cannot violate the Fifth Amendment privilege against self-incrimination." *Accord, e.g.*, *Shaffer* v. *Wilson*, 523 F.2d 175, 177-79 (10th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3249 (Oct. 21, 1975) (No. 75-601); *United States* v. *Murray*, 492 F.2d 178, 191 (9th Cir. 1973); *United States* v. *Scharfman*, 448 F.2d 1352, 1355 (2d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972). Moreover, *Blank* explicitly and *Beck* implicitly rejected *Hill* v. *Philpott*, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), the case which appellants cite as "squarely support[ing]" their claim.

2. Because we hold that "[a]dmitting properly seized 'personal papers' cannot violate the Fifth Amendment privilege against self-incrimination," we can assume that such privilege would otherwise protect appellants from compelled production of those documents. Consequently, it is unnecessary to adjudicate appellees' claim that neither Montgomery, having previously sold his interest in the partnership to Truitt, nor Truitt can assert the privilege even against compelled production of the documents, those documents purportedly being essentially partnership business documents.

We also reject appellants' attack on the search and seizure. Rather than challenging the warrant as being an "overly broad" general warrant, see *United States* v. *Scherer*, 523 F.2d 371, 376 (7th Cir. 1975), *Vonder-Ahe* v. *Howland*, 508 F.2d 364, 368-70 (9th Cir. 1974), or challenging appellees' assertion of "probable cause" that documents used in income tax evasion were located at appellants' offices, appellants challenge the permissibility of the seizure of the documents where appellees "had no reason to believe that any records would be destroyed or secreted." Despite an extensive search, we have found no authority to overturn the district court's view that "[t]here simply is no requirement, so far as probable cause is concerned, that the book and records sought were likely to be hidden or destroyed." Even were we to accept certain *Vonder-Ahe dicta*, the fact remains that appellees requested, and obtained, the search warrant only after appellants refused to permit the reproduction of certain documents. See *VonderAhe*, *supra*, 508 F.2d at 366, 369. But see *United States* v. *Ciaccio*, 356 F. Supp. 1373 (D. Md. 1972).

Finally, appellants claim that certain appellees, Audit Division revenue agents, deprived them of due process by failing to advise them of their constitutional rights in the earlier, civil investigation of appellants' tax liability. Appellants assert no direct violation of the IRS policy, as embodied in IRS News Release Nos. 897 (Oct. 3, 1967), 949 (Nov. 26, 1968), of requiring special agents to advise those being investigated of their constitutional rights. See *United States* v. *Sourapas*, 515 F.2d 295 (9th Cir. 1975); *United States* v. *Leahey*, 434 F.2d 7 (1st Cir. 1970); *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969). But see *United States* v. *Potter*, 385 F. Supp. 681 (D. Nev. 1974); *United*

States v. *Fukushima*, 373 F. Supp. 212 (D. Hawaii 1974). Moreover, the record reflects that the special agents, upon being referred the investigation, complied with the news releases. Joint Appendix 83-84, 95. Similarly, appellants neither assert a violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), nor could there be a *Miranda* violation because there is no evidence or claim that appellants were ever in "custody." E.g., *United States* v. *Allen*, 522 F.2d 1229, 1233 (6th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3416 (Jan. 19, 1976); *United States* v. *Carter*, 462 F.2d 1252, 1256 (6th Cir.), *cert. denied*, 409 U.S. 984, 93 S.Ct. 324, 34 L.Ed.2d 248 (1972). Accord, e.g., *United States* v. *Robson*, 477 F.2d 13, 16 (9th Cir. 1973); *Cohen* v. *United States*, 405 F.2d 34, 36-39 (8th Cir. 1968); *United States* v. *Trnka*, 385 F. Supp. 628, 629-30 (D.N.D. 1974). Rather appellants claim that the Intelligence Division special agent, rather than transmitting the "tip" to the Audit Division for its revenue agents' investigation, should have retained the "tip" for special agents' investigation. Had the "tip" been retained, appellants argue that they would, and should, have received the warnings embodied in News Releases 897 and 949. The record, however discloses no violation of appellants' due process rights in the assignment of the investigation to the Audit Division. See *United States* v. *Leonard*, 524 F.2d 1076, 1088-1090 (2d Cir. 1975); *United States* v. *McCorkle*, 511 F.2d 482, 487-489 (7th Cir. 1975) (en banc); *Robson*, *supra*, 477 F.2d at 16-17; *Trnka*, *supra*. The record reflects that Intelligence Division special agents receive telephone "tips" (Joint Appendix 36, 40), which are often, as here, unconditionally[3] transmitted to the Audit Division (Joint Ap-

3. The uncontroverted affidavits of the Audit Division revenue agents and Intelligence Division special agents establish that after the transmittal to the Audit Division and prior to the referral

pendix 40-41), see *Leonard, supra*, 524 F.2d at 1088-89, *Robson, supra*, 477 F.2d at 14-18, and "occasionally" later referred to the Intelligence Division if the Audit Division revenue agents uncover "indications of criminal tax fraud" (Joint Appendix 41) or "the possible existence of fraud," *Cohen, supra*, 405 F.2d at 35 n. 3 (8th Cir. 1968); *Trnka, supra*, 385 F. Supp. at 630 n. 2.

Affirmed.

(Footnote Continued)
to the Intelligence Division on November 12, 1973, no Intelligence Division employee "attempt[ed] to direct or control the audit activities of the Audit Division in any way." Joint Appendix 38, 41, 58, 61-62, 86. Rather the Audit Division "audits were completely controlled by the [Audit Division revenue] agents assigned . . . until they were referred to, and accepted by, the Intelligence Division." Joint Appendix 43. Accord, Joint Appendix 48-49. The "unconditional" nature of the transmittal has sometimes been mentioned in finding no impropriety in assigning the investigation to the Audit Division revenue agents. *United States* v. *Robson*, 477 F.2d 13, 17 (9th Cir. 1973).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action No. 74-240

JERRY A. TRUITT and JAMES K. MONTGOMERY, JR.,
Plaintiffs,

v.

WILLIAM M. LENAHAN, ET AL.,
Defendants.

MEMORANDUM DECISION

(Filed May 6, 1975)

Brown, Chief Judge: In this action for suppression and return of all evidence obtained by IRS agents (both evidence seized pursuant to a search warrant and evidence obtained by Revenue Agents in a "routine audit") defendants move for summary judgment and plaintiffs move for partial summary judgment. This action arises out of the seizure of certain documents and records by Special Agents of the Internal Revenue Service on April 12, 1974, pursuant to a search warrant issued by a United States Magistrate for the Western District of Tennessee.

In their briefs plaintiffs presented three basic arguments: (1) that the documents seized by defendants were privileged papers within the Fifth Amendment; (2) that the seizure of the records in question was illegal since the search warrant was issued without prob-

able cause; and (3) that plaintiffs were not adequately told of their rights in what was essentially from its inception a criminal investigation, thus violating certain IRS regulations. Defendants, all employees of the United States government, urged four grounds for summary judgment: (1) the doctrine of sovereign immunity bars a recovery; (2) plaintiffs have no Fifth Amendment right against self-incrimination with respect to partnership records; (3) official immunity bars a recovery against these defendants; and (4) plaintiff Montgomery lacks standing because he has no possessory interest in the materials this action seeks to suppress (Truitt having purchased Montgomery's interest in their partnership). Both sides submitted affidavits in support of their motions for summary judgment and a hearing was held.

At the hearing counsel for defendants contended primarily that plaintiffs were adequately advised of their rights. Defendants contended that information of possible criminal tax evasion given by citizens to the IRS Intelligence Division, as occurred here, is frequently referred to the Audit Division, as was done here, unless there is more support for the belief that actual criminal evasion is involved. A warning must be given, defendants contend, only when the investigation has become in fact a criminal investigation.

Counsel for plaintiffs stated that ". . . this case can and should be decided either in favor of the plaintiffs or in favor of the defendants on the search warrant issue, which is really the heart of this case; not that we concede that there is no merit in our claim of surreptitious search and suppression of evidence obtained by [Revenue Agent] Plunket."[1] Plaintiffs' pre-

1. Transcript at 36. *Also see* Transcript at 49 and 51.

sentation thus centered around the proposition that the seizure of the records in question was illegal since the search warrant was not issued with probable cause. Plaintiffs contend that probable cause to seize records can exist only when they are "hidden, concealed, or in danger of being destroyed."

When the court questioned the appropriateness of summary judgment in this case, counsel for both sides joined in urging the court to dispose of this cause on their motions. Counsel for the plaintiffs stated ". . . I want to concur with my colleague, Mr. Moody [defense counsel], that it is an appropriate case for summary judgment, particularly as to the search warrant issue . . . ."[2] Plaintiffs' counsel indicated that there was only "one minor"[3] area of possible factual dispute. Thus, plaintiffs pointed out, there might be a dispute concerning the exact conduct of the defendant IRS agents when they decided to refer the case to the Audit Division and when they failed to inform plaintiffs that they were being audited because information had been received by the Intelligence Division that the plaintiffs were involved in possible criminal tax evasion. Defendants do not dispute that plaintiffs were not informed of the reason for the audit.[4] Nor is there any question that the audit was initiated because of information submitted to the Intelligence Division. Reviewing the affidavits before the court and considering the arguments of counsel, it is apparent that there is no genuine issue as to any material fact. Therefore, this is an appropriate case for summary judgment.

2. Transcript at 35. *Also see* Transcript at 36, 48 and 52.

3. Transcript at 35. *Also see* Transcript at 50-51.

4. Transcript at 7 and 8.

This court finds that the records seized by the IRS are not privileged documents within the Fifth Amendment. (See *Bellis* v. *United States*, 417 U.S. 85 (1974)). Furthermore, defendants' actions informing, or failing to inform, plaintiffs of their rights did not violate Internal Revenue regulations or rights arising from those regulations. Plaintiffs' contention that probable cause to issue a search warrant did not exist because the records seized were not hidden, concealed, or in danger of being destroyed is likewise without merit. While the requirements of probable cause may be difficult to define in some respects, it cannot be confined to those situations suggested by the plaintiffs. There simply is no requirement, so far as probable cause is concerned, that the books and records sought were likely to be hidden or likely to be destroyed. The court has reviewed the sworn material presented to the Magistrate, and it is the conclusion of this court that probable cause existed for the issuance of the search warrant.

The Clerk will enter a final judgment dismissing this cause with prejudice.

ENTER this 6th day of May, 1975.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Caption Omitted)

NOTICE OF APPEAL

(Filed May 13, 1975)

Notice is hereby given that the above plaintiffs, Jerry A. Truitt and James K. Montgomery, hereby

appeal to the United States Court of Appeals for the Sixth Circuit from the Memorandum Decision and the Final Judgment entered in this action on the 6th day of May, 1975.

Dated May 13, 1975.

No. 75-1231

Supreme Court, U.S.
FILED
MAY 4 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

JERRY A. TRUITT AND JAMES K. MONTGOMERY, JR.,
PETITIONERS

v.

WILLIAM M. LENAHAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1231

JERRY A. TRUITT AND JAMES K. MONTGOMERY, JR.,
PETITIONERS

v.

WILLIAM M. LENAHAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

The principal contention presented by the petition is that a search and seizure of petitioners' records by agents of the Internal Revenue Service pursuant to a search warrant violated their Fifth Amendment rights. In this suit brought by petitioners against the agents seeking suppression of any evidence obtained from the records and damages for violation of their constitutional rights, the district court granted summary judgment to the agents of the Internal Revenue Service (Pet. App. B A7-A10) and the court of appeals affirmed (Pet. App. A A1-A6).

The pertinent facts are as follows: Petitioners Truitt and Montgomery are veterinarians. Between September 27, 1968, and March 26, 1973, petitioners practiced in partnership under the name "Animal Hospital" in

Memphis, Tennessee.[1] On September 25, 1972, Martha Jane Greenwood, a former employee if petitioners, called the Internal Revenue Service and stated that petitioners were not reporting all of their income. This information was received by the Intelligence Division of the Internal Revenue Service (R. 35-36, 39).[2] On May 3, 1973, Special Agent Childress of the Intelligence Division was assigned the task of evaluating several items of information, including that supplied by Greenwood, pertaining to petitioners' tax liability. After concluding that the information did not warrant a criminal investigation by the Intelligence Division, Special Agent Childress referred the matter to the Audit Division (R. 40-41). It is undisputed that the Intelligence Division did not control or direct the activities of the revenue agents involved until the case was later returned to the Intelligence Division (Pet. App. A A5-A6, n. 3).

At the commencement of the audit one year later, petitioner Truitt referred Revenue Agent Plunket to Don Holmes, Truitt's accountant. After examining the partnership records for 1971, the revenue agent determined that there was a substantial understatement of income (R. 49-50). On October 11, 1973, Margorie Morris, an employee of petitioner Truitt, approached Revenue Agent Plunket and told him that not all receipts during the year 1971 were deposited in the partnership bank account (R. 51-55). Petitioner Truitt was advised of the understatement of income discovered, and Revenue Agent Plunket asked to

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[1]On March 26, 1973, petitioner Truitt purchased all of his partner's interest in the practice, including all of the partnership records (Pet. 4, n. 1). Since March 26, 1973, petitioner Truitt has practiced veterinary medicine as a sole proprietor.

[2]"R." refers to the record appendix in the court of appeals.

copy the records so that work could be done in Internal Revenue Service offices (R. 50, 51, 55). Truitt was informed that he did not have to allow copying of the records (R. 55). On November 5, 1973, petitioners' accountant Holmes advised Agent Plunket that the records would not be made available for copying. This refusal to turn over the records was repeated by G. Patrick Arnoult, an attorney who was representing petitioners (R. 55-56).

Revenue Agent Plunket thereupon referred the cases of both petitioners to the Intelligence Division as potential fraud cases. Special Agents Cade and Lenahan then proceeded to interview the original informant, Martha Jane Greenwood, and to take a sworn statement from her (R. 60). That statement reaffirmed her original charge that petitioners were not recording and reporting a portion of their cash income (R. 68-70). She also said that both petitioners knew what was being done (R. 72) and added that petitioner Truitt had urged her to refuse to give any information and to deny the knowledge she had (R. 73-74).

The agents thereafter decided to obtain a search warrant to seize petitioners' records. They presented affidavits to a United States Magistrate, setting forth the facts that established probable cause to believe that petitioners had willfully failed to report their true incomes for the years in question. The magistrate issued a warrant to the agents to search for and seize records pertaining to petitioners' 1971 and 1972 tax liabilities (R. 16-18). The search was carried out on April 12, 1974, and various financial records of petitioners were seized (Pet. App. B A7).

1. Petitioners first contend (Pet. 8-9) that the seizure of their books and records violated their Fifth Amendment privilege against compulsory self-incrimination. For the reasons we have set forth in our brief *amicus curiae* in *Andresen* v. *Maryland*, No. 74-1646, argued February 25,

1976,[3] we believe that the court of appeals correctly held that a person's privilege under the Fifth Amendment against being compelled to be a witness against himself cannot be invoked to bar the admission into evidence of business records seized by the Internal Revenue Service in compliance with the Fourth Amendment. See also *Shaffer* v. *Wilson*, 523 F.2d 175 (C.A. 10), petition for a writ of certiorari pending, No. 75-601.

As the Court recently observed in *Fisher* v. *United States*, No. 74-18, decided April 21, 1976, slip op. 7 (footnote omitted), it "has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort." The execution of a search warrant does not involve compulsory testimonial self-incrimination. However, since the issue raised here is now before the Court in *Andresen*, the petition should be held pending the decision in that case.

2. Petitioners' remaining claims do not warrant further review. They also contend (Pet. 11) that the search was unreasonable under the Fourth Amendment because the government had no reason to believe that the records would be concealed or destroyed. But as both courts below concluded, if the probable cause and particularity requirements of the Fourth Amendment are otherwise met, the government need not establish that records constituting evidence of a crime are about to be hidden or destroyed before it may search for and seize them

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[3]We are serving a copy of our *Andresen* brief on petitioners together with this memorandum.

pursuant to a warrant (Pet. App. A A4; Pet. App. B A10)[4]

3. Finally, petitioners argue (Pet. 13-15) that the Internal Revenue agents' failure to warn them of their constitutional rights was a violation of the Internal Revenue Service's own announced rules which require its special agents to warn taxpayers of their constitutional rights prior to the initial interview in a criminal investigation. That policy does not extend to the interviews conducted by revenue agents in connection with a civil audit. In apparent acknowledgement that the warnings are only required to be given by special agents in their interviews of taxpayers under criminal investigation, petitioners claim (Pet. 15) that "the IRS deliberately assigned a Revenue Agent to conduct what it most certainly knew to be a criminal investigation" so that the warnings would not be required. There is, however, no evidence that the assignment of this case to a revenue agent was made in anything other than good faith (Pet. App. A A5-A6, n. 3). The courts of appeals that have considered the question all agree that the good faith referral of an audit assignment to a revenue agent who is not required to warn taxpayers of their constitutional rights before interviewing them, instead of to a special agent who is required to give such warnings, does not deny due process. *United States* v. *Robson*, 477 F.2d 13, 17 (C.A. 9), certiorari denied, 420 U.S. 927; *United States* v. *McCorkle*, 511 F.2d 482, 487-489 (C.A. 7) (*en banc*), certiorari denied, 423 U.S. 826.

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[4]*VonderAhe* v. *Howland*, 508 F.2d 364 (C.A. 9), upon which petitioners rely (Pet. 7), is not to the contrary. There, the court indicated that a search warrant is proper if a request for the records has been denied. Here, the request to copy the records was denied before the warrant was sought, and the court of appeals held that the criteria set forth in *VonderAhe* had been satisfied (Pet. App. A A4).

For the reasons stated, the petition for a writ of certiorari should be held pending the Court's decision in *Andresen* v. *Maryland, supra.*

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1976.